Supreme Court, U.S.
FILED
94 790 NOV 1 1994
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

ZIYA K. KORAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

JOSEPH DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202)514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Section 3585 of 18 U.S.C. provides that a defendant generally must "be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." The question presented is whether a federal prisoner must receive credit on his sentence under Section 3585 for time when he was released on bail pursuant to the Bail Reform Act of 1984.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following are petitioners in this Court: United States Bureau of Prisons and Frank Sizer, warden, Allenwood Federal Prison Camp, Allenwood, Pennsylvania.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	5
Conclusion	18
Appendix A	1a
Appendix B	25a
Appendix C	29a
Appendix D	31a
Appendix E	32a
Appendix F	33a
Appendix G	45a
Appendix H	51a

TABLE OF AUTHORITIES

Cases:

Bilgrami v. *Turner*, No. 93-7793 (3d Cir. July 13, 1994)	17
Brown v. *Rison*, 895 F.2d 533 (9th Cir. 1990)	10, 13
Chalamidas v. *Quinlan*, No. CV-91-859-TSZ (W.D. Wash. Apr. 22, 1992), dismissed in part, reversed in part, 981 F.2d 1257 (9th Cir. 1992)	16-17
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	11, 12
Estate of Cowart v. *Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992)	8
Fraley v. *Bureau of Prisons*, 1 F.3d 924 (9th Cir. 1993)	16
Gozlon-Peretz v. *United States*, 498 U.S. 395 (1991)	9
Grady v. *Crabtree*, 958 F.2d 874 (9th Cir. 1992)	16
Lahey v. *Floyd*, 992 F.2d 234 (9th Cir. 1993)	16

Cases—Continued: Page

Malosh v. *Crabtree*, 758 F. Supp. 620 (D. Or. 1991) 16
Martin v. *OSHRC*, 499 U.S. 144 (1991) 12-13
Mieles v. *United States*, 895 F.2d 887 (2d Cir. 1990) 11
Mills v. *Taylor*, 967 F.2d 1397 (9th Cir. 1992) 6, 7
Moreland v. *United States*:
968 F.2d 655 (8th Cir.), cert. denied, 113 S. Ct. 675 (1992) 6, 7
113 S. Ct. 675 (1992) 14
National R.R. Passenger Corp. v. *Boston & Maine Corp.*, 112 S. Ct. 1394 (1992) 12
Ochoa v. *United States*, 819 F.2d 366 (2d Cir. 1987) 9
Ortega v. *United States*, 510 F.2d 412 (10th Cir. 1975) 10
Pinedo v. *United States*, 955 F.2d 12 (5th Cir. 1992) 6
Polakoff v. *United States*, 489 F.2d 727 (5th Cir. 1974) 10
Ramsey v. *Brennan*, 878 F.2d 995 (7th Cir. 1989) .. 11, 15
Randall v. *Whelan*, 938 F.2d 522 (4th Cir. 1991) .. 11
Reves v. *Ernst & Young*, 113 S. Ct. 1163 (1993) 8
United States v. *Becak*, 954 F.2d 386 (6th Cir.), cert. denied, 112 S. Ct. 2286 (1992) 6, 7
United States v. *Browning*, 761 F. Supp. 681 (C.D. Cal. 1991) 16
United States v. *Edwards*, 960 F.2d 278 (2d Cir. 1992) 6
United States v. *Freeman*, 922 F.2d 1393 (9th Cir. 1991) 16
United States v. *Insley*, 927 F.2d 185 (4th Cir. 1991) 6
United States v. *Peterson*, 507 F.2d 1191 (D.C. Cir. 1974) 9, 10
United States v. *Shimer*, 367 U.S. 374 (1961) 12
United States v. *Smith*, 869 F.2d 835 (5th Cir. 1989) 11
United States v. *Wilson*, 112 S. Ct. 1351 (1992) 11, 12

Cases—Continued: Page

United States v. *Woods*, 888 F.2d 653 (10th Cir. 1989), cert. denied, 494 U.S. 1006 (1990) 6
United States v. *Zackular*, 945 F.2d 423 (1st Cir. 1991) 6

Statutes:

Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1(a), 74 Stat. 738 9
Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 217 9
Bail Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. I, 98 Stat. 1976 8
18 U.S.C. 3141 *et seq.* 7
18 U.S.C. 3142(c) (1) (B) 17
18 U.S.C. 3142(c) (1) (B) (x) 7
18 U.S.C. 3142(i) (2) 8
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976 8
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987 8
18 U.S.C. 3585 2
18 U.S.C. 3585(a) 2, 8
18 U.S.C. 3585(b) ..... *passim*
18 U.S.C. 709a (1934) 9
18 U.S.C. 1956(a) (1) 2
18 U.S.C. 3568 (repealed) 4, 10, 12, 13
28 U.S.C. 2241 15

Miscellaneous:

Bureau of Prisons, Program Statement No. 5880.24 (Sept. 5, 1979) 13
S. Rep. No. 750, 89th Cong., 1st Sess. (1965) 10

In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

ZIYA K. KORAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Attorney General of the United States and all other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 21 F.3d 558.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1994. A petition for rehearing was denied on June 17, 1994. App., *infra*, 29a-30a. On September 8, 1994, Justice Souter extended the time within which to file a petition for a writ of certiorari

to and including October 15, 1994. App., *infra*, 31a. On October 11, 1994, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including November 1, 1994. App., *infra*, 32a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3585 of Title 18 provides:

> Calculation of a term of imprisonment
>
> (a) Commencement of sentence.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.
>
> (b) Credit for prior custody. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> > (1) as a result of the offense for which the sentence was imposed; or
> >
> > (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

STATEMENT

1. On April 23, 1991, respondent was arrested for laundering monetary instruments, in violation of 18 U.S.C. 1956(a)(1). On June 18, 1991, he entered a

guilty plea to that offense in the United States District Court for the District of Maryland. On June 25, 1991, a federal magistrate judge ordered respondent released on bail pending sentencing on condition that respondent reside at a Volunteers of America community treatment center. On October 21, 1991, the district court sentenced respondent to 41 months' imprisonment. Respondent remained at the Volunteers of America facility until November 25, 1991, the date on which he was ordered to surrender for service of his sentence. Respondent then reported to Allenwood Federal Prison Camp in Pennsylvania. App., *infra*, 2a.

Invoking Bureau of Prisons (BOP or Bureau) administrative procedures, respondent sought credit against his sentence for the 150 days that he spent at the community treatment center between June 25 and November 25, 1991. Relying on its established policy, BOP declined to grant the requested credit. After exhausting his administrative remedies, respondent filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania seeking credit for the time he spent in the community treatment center. The district court denied the petition, finding that respondent's stay at the community treatment center did not constitute "official detention" within the meaning of 18 U.S.C. 3585(b), which governs credit for time spent in detention before the commencement of a sentence. App., *infra*, 25a-28a.

2. The court of appeals reversed. App., *infra*, 1a-24a. The court acknowledged that, with the exception of the Ninth Circuit, "most [courts of appeals] have concluded that section 3585 * * * does not require the Bureau to credit presentenced defendants

whose bail conditions allowed them to be confined outside of Bureau of Prison[s] facilities." *Id.* at 7a. The court declined, however, to defer to BOP's view that the phrase "official detention" in Section 3585(b) does not include restrictive conditions of bail. The court explained that the statutory language need not be read "as if it provided 'official detention *by the Attorney General or the Bureau of Prisons*,' " since "there is nothing in the statute which requires or suggests that a defendant must be under the detention of the Bureau" and "[a] court may 'detain' a person as 'official[ly]' as the Attorney General." App., *infra*, 13a-14a.

The court also found that the Bureau's interpretation of the statute was not worthy of deference because it appears in a "Program Statement" rather than in "published regulations subject to the rigors of the Administrative Procedure Act, including public notice and comment." App., *infra*, 9a. Finally, the court placed considerable weight on its belief that BOP followed a "functional" approach to the credit issue under the predecessor statute, 18 U.S.C. 3568 (repealed). According to the court, that functional analysis focused on the restrictiveness of the bail conditions placed on a defendant, and the prior policy might have allowed respondent to obtain credit for his stay at the community treatment center. App., *infra*, 9a-13a.

The court concluded that " 'official detention' for purposes of credit under 18 U.S.C. § 3585 includes time spent under conditions of jail-type confinement." App., *infra*, 23a. Although the court did not define that concept with precision, it believed that its approach would not be difficult to administer, because "only a small percentage of federal defendants are

released to a halfway house," and because the Bureau had experience applying the different but related functional approach to Section 3585(b) adopted by the Ninth Circuit. App., *infra*, 21a-22a. The court remanded the case to the district court to determine whether respondent was in "jail-type" confinement during the time that he was at the community treatment center. *Id.* at 24a. Subsequently, respondent was released pending further proceedings in the court of appeals and the district court. *Id.* at 51a.

REASONS FOR GRANTING THE PETITION

The court of appeals' holding creates a three-way split in the circuits. Seven courts of appeals have sustained the Bureau of Prisons' interpretation of 18 U.S.C. 3585(b): a defendant released on bail, even under restrictive conditions, is not in "official detention" and thus is not entitled to credit against his sentence for that period. The Ninth Circuit, however, previously rejected that approach and required the Bureau to give credit to a defendant who was given bail under conditions found to approach those of incarceration. In this case, the Third Circuit rejected the Bureau's view and adopted what it believed to be a more restrictive variation on the Ninth Circuit's rule, requiring the Bureau to conduct a case-by-case analysis to determine whether a defendant was released on bail into "jail-type" conditions.

The disarray on this issue warrants this Court's intervention. Neither the Third nor the Ninth Circuit has adequately justified its rejection of the Bureau's construction of Section 3585(b), and the case-by-case regime mandated for prisoners in those circuits creates considerable practical difficulties. Moreover, the absence of a national rule governing

credit issues creates inequities in the treatment of similarly situated prisoners and compels the Bureau to administer three different approaches in determining the proper length of a defendant's sentence. This Court's review is required to reinstate the Bureau's longstanding policy on a nationwide basis.

1. The Third Circuit's ruling in this case exacerbates an existing conflict on the proper interpretation of Section 3585(b). Before the Third Circuit's decision in this case, every court of appeals that had considered the question, except for the Ninth Circuit, see *Mills* v. *Taylor*, 967 F.2d 1397, 1400-1401 (1992), had held that restrictive conditions of release on bail are not "official detention" under Section 3585(b). See *Moreland* v. *United States*, 968 F.2d 655 (8th Cir.) (en banc) (time spent in halfway house not creditable), cert. denied, 113 S. Ct. 675 (1992); *United States* v. *Edwards*, 960 F.2d 278, 282-283 (2d Cir. 1992) (home confinement not creditable); *Pinedo* v. *United States*, 955 F.2d 12, 14 (5th Cir. 1992) (per curiam); *United States* v. *Becak*, 954 F.2d 386, 387-388 (6th Cir.) ("physical incarceration [required] to receive credit for presentence detention"), cert. denied, 112 S. Ct. 2286 (1992); *United States* v. *Zackular*, 945 F.2d 423, 425 & n.2 (1st Cir. 1991) (home confinement not creditable); *United States* v. *Insley*, 927 F.2d 185, 186 (4th Cir. 1991) (no credit for home confinement, because only "full physical incarceration" satisfies statutory requirement); *United States* v. *Woods*, 888 F.2d 653, 655-656 (10th Cir. 1989) (halfway house confinement not creditable), cert. denied, 494 U.S. 1006 (1990).

The Ninth Circuit, in *Mills* v. *Taylor*, *supra*, departed from that approach and concluded that "offi-

cial detention" includes conditions that "approach * * * incarceration," even if the defendant is actually released on bail subject to a requirement to dwell in a community treatment facility. 967 F.2d at 1400. And, in this case, the Third Circuit stated that, "[w]hile we do not go as far as does the Ninth Circuit[,] which appears to authorize credit for confinement under somewhat less restrictive conditions," the term "official detention" in Section 3585(b) includes release on bail into "jail-type confinement." App., *infra*, 23a. This Court's review is needed to restore uniformity to this important area of prison administration.

2. The Bureau's interpretation is supported by the text of Section 3585(b), its history, and principles of administrative deference. The Third Circuit erred in rejecting it.

a. Section 3585(b) states that a defendant "shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention" before beginning service of his sentence. The phrase "official detention" in Section 3585(b) should be construed in light of the related statutory provisions that authorize pre-trial restraints on a defendant's liberty, including detention by the Attorney General. The relationship among those provisions "leads to the conclusion that 'official detention' means incarceration." *United States* v. *Becak*, 954 F.2d at 388; accord *Moreland* v. *United States*, 968 F.2d at 662 (Loken, J., concurring). The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, provides a court with only two choices. A defendant who is admitted to bail is considered "released," even when his release is conditioned on his residence in a treatment center. See 18 U.S.C. 3142(c)(1)(B)(x). A defendant is "detained" only when he is denied bail—a ruling that

results in his being "committed to the custody of the Attorney General for confinement in a corrections facility" pending trial and sentence. 18 U.S.C. 3142 (i)(2). Thus, the only "detention" that a defendant may suffer "official[ly]" by virtue of a court order is detention of the type contemplated by the Bail Reform Act of 1984.[1]

The appropriateness of construing Section 3585(b) in light of the statutory provisions governing bail is confirmed by the common origins of these provisions. Congress enacted both the bail provisions and Section 3585(b) as part of the same statute, the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976.[2] That legislation worked a

---

[1] That view is also confirmed by Congress's use of the phrase "official detention" in Section 3585(a), because basic canons of construction suggest that the phrase should bear the same meaning in each of the two subsections. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992); see also *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993). Section 3585(a) provides that a

> sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

The phrase "official detention facility" in that provision refers to a place designed for the incarceration of offenders and under the control of corrections officers, not the type of treatment facility where respondent was "confined."

[2] The provisions of the Comprehensive Crime Control Act of 1984 relating to bail are known as the Bail Reform Act of 1984. Pub. L. No. 98-473, Tit. II, ch. I, 98 Stat. 1976. The provisions of the Act relating to sentencing, including the credit provision at issue here, are known as the Sentencing Reform Act of 1984. Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987.

broad and far-reaching reform of bail and sentencing practices. As this Court recognized in resolving another controversy that resulted from the same reforms, Congress must have been aware of the definitions it gave to statutory terms in the "related legislative enactments" and must have "legislated with reference to [them]." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407-408 (1991).

b. The history of the credit provision underscores its close ties to bail determinations. The original credit provision was enacted in 1932 to clarify when a federal sentence began to run, where BOP had transferred the prisoner from one place of confinement to another. See 18 U.S.C. 709a (1934) (credit for time spent in jail awaiting transfer). The statute "retained th[at] limited thrust until 1960, when Congress sought to clarify whether, under statutes requiring the imposition of a minimum mandatory sentence, the court was free to give recognition to the time a defendant had spent in jail for want of bail." *Ochoa* v. *United States*, 819 F.2d 366, 371 (2d Cir. 1987); see also *United States* v. *Peterson*, 507 F.2d 1191, 1193 (D.C. Cir. 1974) (per curiam). Accordingly, in 1960 Congress required the Attorney General to grant a convicted defendant credit against his sentence "for any days spent *in custody* prior to the imposition of sentence * * * *for want of bail set* for the offense under which sentence was imposed." Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1(a), 74 Stat. 738 (emphasis added).

Congress returned to the credit statute in the Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 217, when it deleted the statutory reference to "want of bail" and made credit available for offenses that did not call for a mandatory minimum sentence. The

Committee Report that accompanied that legislation indicates that the express reference to bail was deleted to clarify that credit should be available for offenses made "nonbailable" by law, and also in cases when the defendant was "not released for some reason other than lack of bail." S. Rep. No. 750, 89th Cong., 1st Sess. 21-22 (1965). In light of that explanation, the lower courts interpreted the 1966 Act to require credit only for defendants who were imprisoned before trial, and rejected claims that onerous conditions of bail could amount to "custody" under the statute. As the D.C. Circuit explained,

> the purpose of Congress was to benefit those who were not released; there was no intention to extend credit to those who were released. Had Congress, in amending the statute, intended to give credit to those who were released pending trial or appeal we think Congress would have said so in plain language; certainly there would have been some discussion of this novel proposal in the reports on the legislation.

United States v. *Peterson*, 507 F.2d at 1193. The court thus concluded that " 'in custody' * * * means detention or imprisonment in a place of confinement and does not refer to the stipulations imposed when a defendant is at large on conditional release." *Id.* at 1192. See also *Ortega* v. *United States*, 510 F.2d 412, 413 (10th Cir. 1975) (per curiam); *Polakoff* v. *United States*, 489 F.2d 727, 730 (5th Cir. 1974) (Wisdom, J.).[3]

---

[3] With the exception of the Ninth Circuit, see *Brown* v. *Rison*, 895 F.2d 533, 536 (1990), all courts of appeals that have since considered the question under the predecessor statute, 18 U.S.C. 3568 (which remains in force with respect to sentences imposed before November 1, 1987), have con-

There is no indication that Congress, in rewording the credit provision as part of the Comprehensive Crime Control Act of 1984, disagreed with the then-unanimous weight of authority that denied any credit to defendants who had secured their release on bail. Rather, as this Court previously stated in construing Section 3585(b), "[i]t is not lightly to be assumed that Congress intended to depart from a long established policy" followed under the predecessor provision. *United States* v. *Wilson*, 112 S. Ct. 1351, 1355 (1992). While Congress in 1984 did "replace[] the term 'custody' with the term 'official detention,'" *ibid.*, the most plausible explanation for Congress's use of the "detention" formulation in Section 3585(b) was to conform the credit provision to the nomenclature used by the Bail Reform Act of 1984.[4]

c. The Third Circuit also failed to give proper deference to BOP's reasonable interpretation of the statute it administers. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Under *Chevron*, the first inquiry is whether the statute reveals an "unambiguously expressed intent of Congress" on "the precise question" addressed by the agency's interpretation. *Id.* at 843.

---

cluded that a defendant is not entitled to credit for any time during which he was released on bail, even if the conditions of his release were quite restrictive. See, *e.g.*, *Randall* v. *Whelan*, 938 F.2d 522, 524 (4th Cir. 1991); *Ramsey* v. *Brennan*, 878 F.2d 995, 996 (7th Cir. 1989); *Mieles* v. *United States*, 895 F.2d 887, 888 (2d Cir. 1990); *United States* v. *Smith*, 869 F.2d 835, 837 (5th Cir. 1989).

[4] As the court below recognized, App., *infra*, 13a, every court of appeals to consider the question has held that the phrase "official detention" in Section 3585(b) means the same thing as the phrase "in custody" in the predecessor statute.

If it does, that ends the inquiry. *Id.* at 842-843. If, however, "the agency interpretation is not in conflict with the plain language of the statute, deference is due." *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). Deference is especially appropriate when "a full understanding of the force of the statutory policy in the given situation * * * depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations." *United States* v. *Shimer*, 367 U.S. 374, 382 (1961).

The Third Circuit did not dispute that BOP is the agency charged with the administration of Section 3585(b). See *United States* v. *Wilson*, *supra* (BOP, as designee of the Attorney General, computes credit after defendant begins his sentence). And that court did not find that Congress had a clear and unambiguous intention on "the precise question" at issue here —*i.e.*, whether credit must be awarded to defendants who have been ordered to comply with restrictive conditions of release. The court concluded, however, that deference is not due to the Bureau's interpretation of Section 3585(b), because that interpretation was not formally embodied in a regulation, and because the court believed that the Bureau's interpretation of the phrase "official detention" in Section 3585(b) is inconsistent with the Bureau's interpretation of the phrase "in custody" in former Section 3568. Neither objection has merit.

While an agency's informal interpretations of a statute it administers are "not entitled to the same deference as norms that derive from the exercise of * * * delegated lawmaking powers," those informal interpretations are "still entitled to some weight on judicial review." *Martin* v. *OSHRC*, 499 U.S. 144,

157 (1991). Here, BOP has embodied its views in a Program Statement that governs the day-to-day decisions of prison administrators nationwide. App., *infra*, 45a-50a; see also *id.* at 33a-44a. BOP's judgment reflects the type of expertise in explicating ambiguous statutory language that warrants judicial deference.

The court also erred in stating (App., *infra*, 9a-10a) that the Bureau of Prisons has taken inconsistent positions in administering the provisions governing credit issues. The Bureau has consistently denied credit to federal prisoners for time spent at a halfway house or other similar institutions as a condition of pre-trial release. In Program Statement No. 5880.24 (Sept. 5, 1979), which interpreted former Section 3568, the Bureau provided that "[j]ail time credit will be given for time spent in the custody of the Attorney General," that "[t]ime spent in residence in a residential community center * * * as a condition of bail or bond * * * is not creditable as jail time," and that "a 'highly restrictive' condition of bail or bond * * * is not considered as time in custody." App., *infra*, 36a, 37a-38a (emphasis omitted). That interpretation has been a consistent feature of the Bureau's administration of Section 3568. The Bureau's approach to Section 3585(b) thus accords with its practice under the predecessor provision.[5]

---

[5] The court of appeals relied on a sentence in the Program Statement that indicated that "time spent in a *jail-type facility* * * * as a condition of bail or bond is creditable as jail time because of the greater degree of restraint." App., *infra*, 38a. Except when required by court order (see, *e.g.*, *Brown* v. *Rison*, *supra*), however, the Bureau never applied that statement to give credit to a defendant released to any type

3. The Third Circuit's error warrants correction by this Court. As we have noted, the Third Circuit's decision deepens an existing circuit conflict on the credit issue. Because of the importance of that issue to federal prison administration, we acquiesced two Terms ago in the petition filed in *Moreland* v. *United States*, 113 S. Ct. 675 (1992) (No. 92-458). Although the Court did not grant review in that case, the Third Circuit's decision to join the Ninth Circuit in rejecting the Bureau's construction of the credit statute has made clear that the circuit conflict will not be resolved through the en banc process in the circuit that created the division of authority. At the same time, the Third Circuit's claim that the approach it adopted does "not go as far as does the Ninth Circuit" in "authoriz[ing] credit for confinement under somewhat less restrictive conditions" (App., *infra*, 23a) indicates that the Bureau must henceforth administer three different interpretations of the credit statute.

The practical impact of the *ad hoc* approach followed by the Ninth and Third Circuits is not confined to those two circuits. The Bureau administers a national prison system and routinely transfers inmates between correctional facilities located in different judicial circuits to maintain security and population balance.[6] A large number of transferred inmates

---

of community treatment facility, and that language was never otherwise invoked by the Bureau as the basis for any "functional approach" to the credit issue. That point is demonstrated by the numerous reported cases decided under the predecessor statute (see, *e.g.*, the cases cited in note 3, *supra*), which were litigated precisely because the Bureau granted no credit to the inmates involved.

[6] We are informed by BOP that during a four-year period ending in July 1994, 133,937 new inmates were admitted to

are likely to be incarcerated at some point in a correctional facility located in the Third or Ninth Circuit, because facilities in those two circuits together account for 30 percent of the Bureau's inmate population.[7] Because the means for obtaining judicial review of an administrative denial of sentence credit is an application for habeas corpus filed in the district of the inmate's confinement (see 28 U.S.C. 2241), any inmate transferred to a Bureau facility in one of those two circuits, even temporarily, can require a federal district court to determine whether the conditions of his release on bail were sufficiently onerous to warrant an award of credit under the law followed in that circuit.

The ruling below also requires BOP, in the first instance, to make factual determinations for which it rarely will have available pertinent and reliable information. For that reason, unlike the straightforward approach applied by the Bureau for decades, it is doubtful that the rule adopted by the Third Circuit can be implemented in a consistent fashion. And the rule is certain to generate cumbersome litigation about "matter[s] of judgment, or policy, or discretion" that are "not * * * susceptible of rational determination, at least by tools of inquiry available to judges." *Ramsey* v. *Brennan*, 878 F.2d at 996.

Under the Bureau's interpretation of Section 3585(b), the Bureau can make credit determinations

---

Bureau facilities. A total of 213,512 inmate transfers among Bureau facilities occurred during the same period.

[7] There are a total of 22 correctional facilities in the Ninth and Third Circuits. As of September 15, 1994, the 12 federal institutions in the Ninth Circuit housed 12,749 inmates. The 10 institutions in the Third Circuit housed 13,135 inmates. The total inmate population at Bureau facilities on that date was 85,474.

on the basis of the documentary evidence that ordinarily accompanies the inmate after he is sentenced—the inmate's judgment of conviction and bail form. Those documents will ordinarily disclose whether the defendant was released on bail during the pendency of the proceedings, and on what conditions. Typically, however, those documents will not contain any description of precisely how "jail-like" those conditions were. The rule adopted by the Bureau therefore permits the Bureau to make credit determinations quickly and efficiently on the basis of information readily available from reliable law enforcement sources.

By contrast, the Third Circuit's case-by-case approach requires BOP to investigate and analyze the conditions applicable to federal prisoners who have spent time in any of the dozens of community treatment centers scattered around the United States.[8]

---

[8] The practical problem is not limited to treatment centers or halfway houses. As the experience of the Ninth Circuit demonstrates, prisoners who suffered other forms of presentencing constraint will seek to expand the panel's holding to their individual circumstances. See, *e.g.*, *Fraley* v. *Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir. 1993) (per curiam) (prisoners required to stay at home pending trial); *Lahey* v. *Floyd*, 992 F.2d 234, 235-236 (9th Cir. 1993) (same); *United States* v. *Browning*, 761 F. Supp. 681, 682 (C.D. Cal. 1991) (same); see also *Grady* v. *Crabtree*, 958 F.2d 874, 875 (9th Cir. 1992) (prisoner confined at halfway house as a condition of post-trial probation); *United States* v. *Freeman*, 922 F.2d 1393, 1396-1397 (9th Cir. 1991) (prisoner claiming credit for time on pre-trial "probation"); *Malosh* v. *Crabtree*, 758 F. Supp. 620, 621 (D. Or. 1991) (prisoner required to reside on a military base as a condition of pre-trial release); *Chalamidas* v. *Quinlan*, No. CV-91-859-TSZ (W.D. Wash. Apr. 22, 1992) (special parolee seeking credit for time spent in a community treatment center as a condition of special

Those centers usually are owned and operated by private entities, such as the Volunteers of America facility at issue in this case, and impose a variety of different regimens on their residents. The records of those centers are not available to BOP as a matter of course. Moreover, BOP would be compelled to rely on the accuracy and reliability of representations of private centers that BOP does not control.

Even when there is no reason to doubt the reliability of the information furnished, that information may not significantly aid the Bureau in performing the task required by the decision below. The restrictiveness of bail conditions can vary even with respect to inmates who are required by the terms of their bail bonds to reside at the same treatment center. As the Third Circuit appeared to recognize (App., *infra*, 23a-24a), two residents of the same community center could be treated differently under that court's approach to the credit statute depending on whether one of them was permitted to leave for work during part of the day. Yet the number of possible permutations of restrictive conditions of bail is virtually limitless, because the Bail Reform Act of 1984 encourages judicial officers to innovate in fashioning conditions of release that will obviate the need for pre-trial incarceration, see 18 U.S.C. 3142(c)(1)(B).

---

parole), dismissed in part, reversed in part, 981 F.2d 1257 (9th Cir. 1992) (No. 91-36314) (Table). A similar trend has already begun in the Third Circuit. Following its decision in this case, the Third Circuit ordered a hearing in the case of a defendant who, as a condition of bail, had been ordered to rent, and reside at, a condominium located in an exclusive Tampa, Florida, development, and to pay for private guards who would ensure that he appeared for trial. *Bilgrami* v. *Turner*, No. 93-7793 (July 13, 1994).

The Third Circuit speculated that its rule would be easy to administer because "few situations * * * will arise" (App., *infra*, 23a) in which an inmate will suffer restrictions that are sufficiently severe to warrant credit. That view is contradicted by the volume of litigation over the issue, as well as by the practical fact that a large number of inmates will have an enormous incentive to litigate about BOP's application of a "functional approach" in the context of their particular bail bonds. A rule that overturns the agency's longstanding policy, deviates from the law of other circuits, and invites so much unwarranted litigation calls for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

JOSEPH DOUGLAS WILSON
Attorney

NOVEMBER 1994

APPENDIX A

Filed April 25, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7357

ZIYA K. KORAY, APPELLANT

v.

FRANK SIZER;
UNITED STATES BUREAU OF PRISONS;
ATTORNEY GENERAL OF THE UNITED STATES

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 92-01458)

Submitted Pursuant to Third Circuit LAR 34.1
March 4, 1994

Before: SLOVITER, *Chief Judge*
COWEN and LEWIS, *Circuit Judges*

(Filed: April 25, 1994)

OPINION OF THE COURT

SLOVITER, *Chief Judge.*

I.

On April 23, 1991, Ziya Koray was arrested for laundering monetary instruments in violation of 18 U.S.C. § 1956(a)(1). On June 18, 1991, Koray entered a guilty plea. On June 25, 1991, a federal Magistrate Judge released Koray pursuant to 18 U.S.C. § 3142(c) & (h) (1988 & Supp. III 1991) into the custody of the Pretrial Services Agency and ordered him to be "confined to the premises of [the Volunteers of America 'halfway house type facility'] and shall not be authorized to leave for any reason unless accompanied by Special Agent Dennis Bass." App. at 17. On October 21, 1991, the district court sentenced Koray to 41 months imprisonment with two years of supervised release. Koray remained at the Volunteers of America halfway house until November 25, 1991, when he reported to the Allenwood Federal Prison Camp in Montgomery, Pennsylvania.

Koray received a credit of 64 days for the time spent in jail between April 23 and June 25 pursuant to 18 U.S.C. § 3585 (1988). However, the Bureau of Prisons declined to credit him for the approximately 150 days he was confined to the Volunteers of America facility. After exhausting his administrative remedies, Koray sought a writ of habeas corpus from the district court for the Middle District of Pennsylvania on October 15, 1992, arguing that the Bureau misapplied the statute in not crediting him for the time spent while "released" with restrictive conditions. The district court found that restrictive release conditions can never amount to "official detention" under section 3585(b) and denied the petition for a writ of habeas corpus. Koray filed this

timely appeal. The district court had jurisdiction under 28 U.S.C. § 2241 (1988). We have appellate jurisdiction under 28 U.S.C. § 1291 (1988) and review this question of statutory interpretation *de novo*.[1] *See Barden v. Keohane*, 921 F.2d 476, 479 (3d Cir. 1990).

II.

Credit for prior custody is determined by 18 U.S.C. § 3585(b), which provides:

> Credit for prior custody.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has *spent in official detention* prior to the date the sentence commences—
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

(emphasis added). The relevant question is whether "official detention" includes a court order of confinement in a facility such as a halfway house as a condition of bail.

A.

Prior to 1960, sentencing courts gave credit toward the sentence imposed for time spent in pre-

---

[1] In the district court, Koray also argued that the statute violated equal protection by treating pre-trial defendants differently than post-sentenced defendants. The district court rejected this argument. Koray does not raise his equal protection argument on appeal, and we do not address it.

sentence custody. *See Soyka v. Alldredge*, 481 F.2d 303, 305 & n.6 (3d Cir. 1973). However, courts lacked authority to give such credit to a defendant sentenced to a statutory mandatory minimum, *see Stapf v. United States*, 367 F.2d 326, 328 (D.C. Cir. 1966), and the number of such statutes markedly increased. To avoid the disparity between those sentenced under a mandatory minimum and those who were not, and also between those granted bail and those who were not, Congress amended the statute in 1960 to grant credit for pre-sentence confinement. Codified at 18 U.S.C. § 3568, the provision required that "the Attorney General shall give any [person convicted] credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence." Pub. L. No. 86-691, § 1 (a), 74 Stat. 738, 738 (1960).

This provision was amended in 1966 to expand the credit provisions, removing the requirement that credit only be granted in cases of mandatory minimums, increasing the offenses which could be counted for credit, and removing any mention of bail. It required that the "Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." Pub. L. No. 89-465, § 4, 80 Stat. 214, 217 (1966) (codified at 18 U.S.C. § 3568 (1982)).

In the Sentencing Reform Act of 1984, Congress rewrote section 3568 and recodified it as section 3585 (b). *See* Pub. L. No. 98-473, 98 Stat. 1998, 2001 (1984). "Congress entirely rewrote § 3568 when it

changed it to its present form in § 3585(b). It rearranged its clauses, rephrased its central idea in the passive voice, and more than doubled its length." *United States v. Wilson*, 112 S. Ct. 1351, 1355 (1992). "Congress altered § 3568 in at least three ways when it enacted § 3585(b). First, Congress replaced the term 'custody' with the term 'official detention.' Second, Congress made clear that a defendant could not receive a double credit for his detention time. Third, Congress enlarged the class of defendants eligible to receive credit." *Id.* at 1355-56.

B.

We have had few opportunities to consider the scope of either section 3585 or its predecessor. This court recently declined to decide the question presently before us because the defendant had not exhausted his administrative remedies. *See United States v. Brann*, 990 F.2d 98, 103-04 (3d Cir. 1993).

The only prior decision in which this court spoke to the issue of credit for time outside of prison was *United States v. Golden*, 795 F.2d 19 (3d Cir. 1986), which concerned time spent in the Federal Witness Protection Program rather than in a halfway house. In *Golden*, the defendant entered into an agreement to plead guilty to two lesser counts and to assist the government in its investigation and prosecution of drug-related crimes. The government agreed to place him in the Federal Witness Protection Program. The district court sentenced the defendant to eight years and ordered "that the defendant is permitted to self-report at such time and place when notified by the United States Marshal's Office." *Id.* at 20 (quotation omitted). The defendant then remained at large in

the Witness Protection Program until the Marshal ordered him to report to prison twenty-one months later. Defendant appealed, claiming that the sentence was illegal because the district court failed to specify when it would begin. We agreed, and remanded for resentencing.

We rejected the defendant's claim that he was entitled as a matter of law to credit for the time he spent in the Witness Protection Program, stating "[g]enerally, a defendant is not entitled to credit for time spent released on his own recognizance prior to entering prison." *Id.* at 21. Therefore, we rejected the defendant's contention that failure to credit his sentence for time spent in the Witness Protection Program was a breach of the plea agreement, stating:

> The plea agreement specifically provided that he would be given credit for periods of incarceration prior to sentencing. By statute, credit for time prior to commencement of the sentence is given for time spent in custody. However, custody has been defined as actual incarceration. *See United States v. Ortega*, 510 F.2d 412 (10th Cir. 1975). While restrictions were placed on [the defendant], the district court was not required to equate his life in the Witness Protection Program with incarceration.

Id.

On the other hand, we suggested that the issue of credit was one for the discretion of the district court, stating that on resentencing the district court "may determine that [defendant] is entitled to a credit for some portion of the twenty-one months between the time [he] was sentenced and the time he was actually ordered to report to prison." *Id.* Thus, we

may have been suggesting that some of the time the defendant was in the Witness Protection Program was more restrictive than mere recognizance and therefore could be entitled to credit.

Finally, although not directly on point, we considered the issue of comparability between prison and a halfway house in *United States v. Parker*, 902 F.2d 221 (3d Cir. 1990). Defendant appealed from his sentence of six months of confinement in a community facility on the ground that it did not represent a departure as recommended by the government because six months in the community center was equivalent to the minimum sentence under the guidelines. We disagreed, stating, "[w]e think it clear that a period of confinement as a condition of probation, subject to a defendant's being released to go to work, cannot possibly be equated with an equivalent period of imprisonment." *Id.* at 222. *Parker* presents less assistance than *Golden*, and *Golden* is itself not directly relevant because of the marked fact difference.

C.

The other Courts of Appeals to have considered this issue are divided. Although most have concluded that section 3585, like its predecessor section 3568, does not require the Bureau to credit presentenced defendants whose bail conditions allowed them to be confined outside of Bureau of Prison facilities, that conclusion was not reached without dissent. *See, e.g.*, *Moreland v. United States*, 968 F.2d 655, 659-60 (8th Cir.) (en banc) (plurality) (with one judge concurring in judgment and five judges dissenting), *cert. denied*, 113 S. Ct. 675 (1992); *United States v. Becak*, 954 F.2d 386, 387-88 (6th Cir.), *cert. de-*

nied, 112 S. Ct. 2286 (1992); *Spinola v. United States*, 941 F.2d 1528, 1529 (11th Cir. 1991); *Randall v. Whelan*, 938 F.2d 522, 525 (4th Cir. 1991) (with Butzner, J., dissenting); *United States v. Insley*, 927 F.2d 185, 186 (4th Cir. 1991); *United States v. Woods*, 888 F.2d 653, 655-56 (10th Cir. 1989), *cert. denied*, 494 U.S. 1006 (1990); *Ramsey v. Brennan*, 878 F.2d 995, 996 (7th Cir. 1989); *United States v. Smith*, 869 F.2d 835, 837 (5th Cir. 1989); *United States v. Figueroa*, 828 F.2d 70, 71 (1st Cir. 1987) (per curiam); *see also United States v. Westmoreland*, 974 F.2d 736, 740-45 (6th Cir. 1992) (Engel, J., dissenting), *cert. denied*, 113 S. Ct. 1818 (1993). In addition, the Ninth Circuit has rejected the conclusion reached by the other circuits, holding instead that when conditions of release approach those of incarceration, a detainee is in "official detention" for purposes of section 3585. *See Fraley v. United States Bureau of Prisons*, 1 F.3d 924, 925-26 (9th Cir. 1993); *Lahey v. Floyd*, 992 F.2d 234, 235-36 (9th Cir. 1993); *Mills v. Taylor*, 967 F.2d 1397, 1400-01 (9th Cir. 1992); *Grady v. Crabtree*, 958 F.2d 874, 875 (9th Cir. 1992) (per curiam); *Brown v. Rison*, 895 F.2d 533, 536 (9th Cir. 1990).

In reaching the decision that no credit should be awarded, some of the courts have deferred to the interpretation of the statute used by the Bureau of Prisons. *See Moreland*, 968 F.2d at 658; *Randall*, 938 F.2d at 525 & n.3; *Ramsey*, 878 F.2d at 996 (Bureau's interpretation "is a reasonable opinion by officials having greater knowledge of federal penal policy than we judges have, so we are inclined to defer to it.").

It is far from clear that the Bureau of Prisons' determination that section 3585 does not require credit be granted when a court "releases" a presentenced defendant to a halfway house should be granted the substantial deference that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires to be given to an agency's own interpretation of the statute it administers. The Bureau's interpretation is recorded in its "Program Statements," which are merely internal agency guidelines and may be altered by the Bureau at will. *See* Bureau of Prisons, Program Statement 1221.02.1.2.1 (Apr. 12, 1993) (describing how Program Statements are promulgated and modified). As such, it is entitled to a lesser level of deference from the courts than are published regulations subject to the rigors of the Administrative Procedures Act, including public notice and comment. *See FLRA v. United States Dep't of Navy*, 966 F.2d 747, 762 & n.14 (3d Cir. 1992) (in banc); *Marshall v. Rosemont, Inc.*, 584 F.2d 319, 321 (9th Cir. 1978).

Even when we accord the Bureau's interpretation some level of deference, we must examine whether the Bureau engaged in the necessary "reasoned analysis" of this issue. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (revision of regulations requires "reasoned analysis"). In that connection, it is difficult to ignore the fact that the rationale given by the Bureau for its refusal to accord credit for time spent by a pretrial detainee in a halfway house is different under section 3568 than it is under the currently applicable section 3585. When interpreting section 3568, the Bureau rationalized its decision not to ac-

cord credit on the basis of the degree of restraint. Thus it distinguished between "[t]ime spent in residence in a *residential community center*" where "the degree of restraint . . . is not sufficient restraint to constitute custody" and "time spent in a *jail-type* facility . . . as a condition of bail or bond" which was "creditable as jail time because of the greater degree of restraint." Bureau of Prisons, Program Statement No. 5880.24(5)(b)(5) (Sept. 5, 1979), *quoted in Johnson v. Smith*, 696 F.2d 1334, 1336 (11th Cir. 1983).

Although the Bureau still retains this functional analysis for defendants governed by section 3568, *see* Bureau of Prisons, Program Statement 5880.30(7)(b)(5) (July 16, 1993), it uses a different approach for section 3585. Now it focuses on whether the defendant has been "released" to pretrial services or "detained" by the Attorney General. *See* 18 U.S.C. § 3141(a) (1988) ("A judicial officer authorized to order the arrest of a person under section 3041 of this title before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings, under this chapter.").

The Program's current position is that "[t]ime spent in residence in a community corrections center as a result of the Pretrial Services Act of 1982 (18 U.S.C. § 3152-3154), or as a result of a condition of bail or bond (18 U.S.C. § 3141-3143), is not creditable as presentence time." Bureau of Prisons, Program Statement 5880.28(c) (Feb. 21, 1992). It has determined that "[a] condition of bail or bond which is 'highly restrictive,' and that includes 'house arrest', 'electronic monitoring' or 'home confinement'; or such as requiring the defendant to report daily to

the U.S. Marshal, U.S. Probation Service, or other person; is not considered as time in official detention." *Id.* The rationale given by the Bureau is that "[s]uch a defendant is not subject to the discretion of the U.S. Attorney General, the Bureau of Prisons, or the U.S. Marshals Service, regarding participation, placement, or subsequent return to a more secure environment, and therefore is not in a status which would indicate an award of credit is appropriate." *Id.* The Bureau also believes that "the government may not prosecute for escape in the case of an unauthorized absence in such cases, as the person has been lawfully *released* from 'official detention.' " *Id.*

The distinction in approaches is highly significant for Koray. Under the earlier rationale he might be able to convince the Bureau or a court that his conditions of confinement in the Volunteers of America facility were similar to those in a "jail-type facility" and that credit was appropriate notwithstanding the Bureau's generally applicable rule denying credit for time spent in a halfway house. Under the current rationale, Koray would not have that opportunity because he is clearly in the custody of pretrial services rather than the Attorney General.

In order to determine whether the Bureau's interpretation withstands "reasoned analysis" we must examine whether the intervening statutory change from "custody" to "official detention" can carry the weight of this new interpretation. The legislative history of the change is both lengthy and unenlightening. While we describe it in the margin, we note that Congress has used the terms "custody," "official custody," "confinement" and "official detention" interchangeably in describing this provision, as would

a normal English speaker.[2] Indeed, the title of the subsection remains "Credit for Prior *Custody*." (emphasis added). *See INS v. National Ctr. for Immi-*

---

[2] The "official detention" language now codified at § 3585 was originally introduced in the 93rd Congress in S. 1, which was a comprehensive effort to revise Title 18 of the United States Code. *See* S. 1, 93d Cong., 1st Sess. (1973). That language remained when the version of the bill was reported out of the Judiciary Committee in the 94th Congress. *See* S. 1, 94th Cong., 1st Sess. (1975). In the only discussion of this section, the Judiciary Committee's Report described the then present federal law, which was § 3568, as providing "that the offender will receive credit for any time spent in custody" and described the proposed language as providing "credit towards the sentence of imprisonment for any time the defendant has spent in *official custody* prior to the date the sentence was imposed." S. Rep. No. 00, 94th Cong., 2d Sess. 926-27 (1976) (emphasis added). The same language of the bill continued throughout revisions in the 95th, 96th and 97th Congress as S. 1437, S. 1722, and S. 1630 respectively. *See* S. 1437, 95th Cong., 1st Sess. (1977); S. 1437, 95th Cong., 2nd Sess. (1978); S. 1722, 96th Cong., 1st Sess. (1979); S. 1630, 97th Cong., 1st Sess. (1981). Moreover, the Judiciary Committee's Report used the same descriptive language concerning this provision each time. *See* S. Rep. No. 605, 95th Cong., 1st Sess. 935-36 (1977); S. Rep. No. 553, 96th Cong., 2d Sess. 996 (1980); S. Rep. No. 307, 97th Cong., 1st Sess. 1049 (1981). Finally, in the 98th Congress, the provision was included in two bills. S. 668 and S. 1762. The Senate Judiciary Committee reported out both these bills with the exact same description of the provision. S. Rep. No. 223, 98th Cong., 1st Sess. 125-26 (1983); S. Rep. No. 225, 98th Cong., 1st Sess. 128-29 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3311-12. The Senate passed S. 1762.

Meanwhile, the House Judiciary Committee which reported out H.R. 6915 tracking the language of the previous Senate bills described the provision as providing "a defendant be given credit toward the service of a term of imprisonment

grants' Rights, Inc., 112 S.Ct. 551, 556 (1991) (may use title to construe statute).

From this we conclude, as have all the circuits which have considered the issue, that the use of the word "official detention" rather than the word "custody" was not intended to alter the meaning of the statute. *See Moreland*, 968 F.2d at 657-58 n.6 (plurality); *id.* at 664 (Heaney, J., dissenting); *Mills*, 967 F.2d at 1400; *United States v. Edwards*, 960 F.2d 278, 283 (2d Cir. 1992); *Pinedo v. United States*, 955 F.2d 12, 14 (5th Cir. 1992); *Becak*, 954 F.2d at 387-88; *Insley*, 927 F.2d at 186; *Woods*, 888 F.2d at 655.

It follows that before we accord any substantial deference to the Bureau, we must look to whether the Bureau has articulated any sustainable rationale for reading "official detention" as if it provided "official detention *by the Attorney General or the Bureau of Prisons.*" The plain meaning of the words "offi-

---

for any time spent in *confinement* before the commencement of the sentence of imprisonment if that time has not been credited against another sentence." H.R. Rep. No. 1396, 96th Cong., 2d Sess. 474 (1980) (emphasis added). In the 98th Congress, the House Judiciary Committee, while rejecting much of what was in S. 1762, proposed its own crime bill which incorporated a provision similar to the Senate's credit provision except that it provided that a "defendant shall be given credit toward the service of a term of imprisonment for any time spent in *custody* before the date on which the term commences." H.R. 6012, 98th Cong., 2d Sess. (1984) (emphasis added). The Judiciary Committee reported that this provision required credit be given for "any time spent in *confinement* before the commencement of the sentence of imprisonment." H.R. Rep. No. 1017, 98th Cong., 2nd Sess. 54 (1984) (emphasis added). The House passed the Senate's version without any changes to the credit provision.

cial detention" does not require this result; there is nothing in the statute which requires or suggests that a defendant must be under the detention of the Bureau. *But see Randall*, 938 F.2d at 525 ("There exists a strong presumption that 'custody' refers to the legal authority of the custodian rather than to actual housing conditions."). A court may "detain" a person as "official[ly]" as the Attorney General. *Cf. United States v. Camarata*, 828 F.2d 974, 981 (3d Cir. 1987) (Becker, J., concurring) (defendant on bail "was under the custody of the court, not the Attorney General"), *cert. denied*, 484 U.S. 1069 (1988).

It is therefore difficult to view Koray's detention as other than "official" since he was put in the "custody" of pretrial services, 18 U.S.C. § 3142(c)(1)(B)(i), and was confined to the halfway house by court order. Although the Bureau notes that only an escape from one of its facilities permits prosecution as an escape from confinement under 18 U.S.C. § 751(a), *see United States v. Baxley*, 982 F.2d 1265, 1269-70 (9th Cir. 1992); *United States v. Miranda*, 749 F. Supp. 1062, 1063-64 (D. Colo. 1990); *but cf. Ramsey*, 878 F.2d at 996 (dicta), this does not mean that escape from the Volunteers of America facility would have gone unpunished. In fact, Koray's failure to comply with the conditions of his release would be a felony and would have subjected him to what the Bureau concedes is "a more severe punishment." Appellee's Br. at 15 n.5; *see* 18 U.S.C. §§ 3146(b), 3148(a) (1988); *United States v. George*, 625 F.2d 1081, 1084-85 (3d Cir. 1980) (failing to report to U.S. Marshal as required by condition of bail is a felony under the Bail Reform Act).

Moreover, the Bureau itself does not always limit "official detention" to that served under the custody

of the Attorney General. In this connection we note that the Bureau has characterized other custody as "constructive federal custody" and has been willing to give presentenced defendants credit under section 3585 and its predecessor section 3568 for certain time spent in state facilities, even though the defendant was not in the Attorney General's custody. *See, e.g.*, Bureau of Prison, Program Statement 5880.28 (c)(1)(a)(2),[3] 5880.28(c)(1)(b)[4] (Feb. 21, 1992);

---

[3] Under the Program Statement cited in the text, credit will not be given for any portion of time spent serving another sentence regardless of whether the sentence is federal, state, or foreign, *except as follows*:

> *a.* Time spent serving another foreign or state sentence that is vacated may be creditable as prior custody time credit provided the sentence was not vacated merely for resentencing. Any such time which is credited must be time spent after the commission of the federal offense. If a vacated state or foreign sentence results in a retrial and subsequent resentencing, any credit applied to that resentencing must be removed from the federal sentence computation, provided the inmate has not yet been released from that sentence.
>
> *b.* Time spent serving another federal, foreign or state sentence that is vacated merely for resentencing shall not have any effect on the [Sentencing Reform Act (SRA)] sentence computation until such time as the inmate is resentenced. If the resentencing results in a term which is less than the time the inmate has already served on the vacated sentence, the excess time not now credited to any other sentence shall be credited to the SRA term provided it was time spent after the commission of the federal offense.

[4] Under another section, credit related to 18 U.S.C. § 3585(b)(2) will be given as follows:

> *1.* Prior Custody Credit will be given for time spent in official detention as the result of any federal, state or

foreign arrest which is not related to, yet occurred on or after the date of commission of the federal offense for which the SRA sentence was imposed; provided it has not been credited to another sentence. The language in this Section eliminates any need for a federal detainer to be on file or for bail to be set on the state or foreign charges as a prerequisite for applying such presentence time credit toward the federal sentence. Relevant prerequisites are:

a. The non-related official detention must have occurred on or after the *date* of the federal offense for which the SRA sentence was imposed.

b. The non-related official detention must not have been granted on another sentence. If it was applied on a state or foreign sentence, then credit is not applicable to the SRA sentence.

2. Failure by the state to grant official detention credit on a state sentence can be determined if:

a. The state charges are dismissed.

b. State probation is granted.

c. The federal term is concurrent with the state term and the Full Term Date of the state term is absorbed within the Full Term Date of the federal sentence (prior to applying any presentence credits and regardless of any award of prior custody credits by the state). Prior custody credits would be given up to the date that the first sentence begins to run, federal or state. Credit may *not* be applied for any time spent prior to the date of the SRA offense. Further, if the release from the non-federal sentence occurs prior to the imposition of the federal sentence, then any non-federal prior custody time awarded on the state sentence may *not* be applied to the federal sentence.

d. The state sentence is vacated with further prosecution deferred, thereby effectively vacating the state's credit . . . .

e. Ordinarily, if a state sentence is served, the inmate will have received credit for the presentence

id. at 5880.30(7)(c)(1) (July 16, 1993);[5] *see also Moreland*, 968 F.2d at 660 n.10.

---

official detention. However, if it can be demonstrated that the state did not credit the time, the credit will be awarded for time in state custody consistent with the instructions set forth in this section.

(table omitted).

[5] This section, entitled "constructive federal custody," applies to defendants still governed by section 3568 as follows:

(1) For time in non-federal custody when the non-federal custody is based on charges that later resulted in a federal sentence.

(a) Credit shall be given for all time spent in non-federal or foreign custody when the underlying basis for custody in fact is a federal warrant. For example, if a federal warrant is issued and the defendant is arrested by county police or foreign officials on the basis of the federal warrant, credit shall be given from the date of arrest to the date of sentence for all days in custody. Inquiries or requests for foreign presentence time credit, along with copies of the judgment and commitment and copies of any documentation in the institution or in the possession of the prisoner, must be sent to the Chief of Inmate Systems Management for verification.

(b) If the federal defendant has been in presentence state or foreign custody on essentially the same charges, credit shall also be given even though a federal detainer may not have been on file during that time. Credit shall also be given for time spent in non-federal presentence custody when the non-federal and federal charges are similar enough to be considered the same criminal act or offense. This non-federal presentence custody is applicable when the factors of time, location, and the criminal acts are identical in both charges. Credit shall also be given for all time spent serving a state sentence (on

It follows from the anomalous result proffered by the Bureau and the absence of any support therefor in the statute or legislative history that the deference which we must accord it is minimal. *See Mills*, 967 F.2d at 1400 ("BOP's interpretation of section 3585 is unreasonable"); *Brown*, 895 F.2d at 536 ("we cannot accept as reasonable a definition of 'custody' that excludes enforced residence under conditions approaching those of incarceration; to do so would be contrary to the considerations of fairness that must have underlain Congress's provision of credit for time served").

After all, it is the statutory language we must construe. "To a normal English speaker, even to a legal English speaker, being forced to live in a halfway house is to be held 'in custody' . . . "*Ramsey*, 878 F.2d at 996; *see also Brown*, 895 F.2d at 536. The "ordinary and obvious meaning of [a] phrase is not to be lightly discounted." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). Such an understanding of "custody" has also been articulated by organizations involved in defining the standards in the field. *See* 3 American Bar Association, *Standards for Criminal Justice* 18-319 (2d ed. 1980) (should grant credit for time spent in "custody," including any bail program which "imposes substantial restrictions on the offender's freedom of activity"); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* § 5.8 comment. (1973) ("In some cases . . . conditions for pre-trial release are substantial and involve serious restrictions on liberty. Where

---

the same charges as defined in this paragraph), which has its conviction vacated with no further prosecution to follow, in addition to any other non-federal presentence time.

supervision is substantial, courts should be authorized to grant a measure of credit for such time against the sentence imposed.").

Notwithstanding the latter, we are not prepared to open the floodgates of credit by viewing "official detention" as encompassing the vast array of alternative sentencing mechanisms which are currently used in the federal system to confine and rehabilitate accused and convicted defendants. Instead, we find ourselves persuaded by the comments of Judge Heaney, for the five dissenters in *Moreland*: "Under the statute, the degree of confinement is what is at issue . . . . Moreover, . . . the restrictions on [the defendant's] liberty were among the most severe that could have been imposed as a condition of pretrial release. The government placed [the defendant] into a halfway house not only to ensure his appearance at trial but also to protect the community, a goal that is perhaps the central purpose of incarceration today." *Moreland*, 968 F.2d at 666-67.

Although the Bureau of Prisons maintains its position that "conditions at community treatment centers *generally* are neither penal in nature nor nearly as restrictive as those in a full custodial environment," Appellee's Br. at 9 (emphasis added), it does not argue that the release conditions imposed on Koray are not equal to the restrictions imposed on some defendants in the custody of the Bureau who do receive credit against their sentence. While the district court did not make factual findings regarding the conditions of confinement at the Volunteers of America facility, according to the allegations in Koray's motion in the district court (unchallenged by the Bureau), he was subjected to substantial restrictions on his liberty: he was permitted to leave

the facility only once in 150 days (for a medical exam), he had to account for his presence five times a day, he was subject to random breath and urine tests, his access to visitors was limited in both time and manner, and there was a paucity of vocational, educational, and recreational services compared to a prison facility. In its brief, the Bureau admits that "the Volunteers of America maintains a halfway house similar to the manner in which the Bureau of Prisons may also operate such facilities." Appellee's Br. at 14.

The Bureau would preclude any factual determination of whether a prisoner was held under jail-type conditions, arguing that a bright-line rule is necessary in light of the fact-specific nature any alternative would require. Some courts have agreed. *See Randall v. Whelan*, 938 F.2d 522, 525 (4th Cir. 1991) (broader definition of custody "would mire the judiciary in a swamp of factual and circumstantial details that would likely produce inconsistent and standardless decisions"); *Moreland*, 968 F.2d at 663 (Loken, J., concurring in judgment). It is significant, however, that the facts in many of the cases which appear to support a broad rule giving credit for time in a halfway house were markedly different than these here, and those defendants would not have been entitled to credit under the criterion of "jail-type detention." For example, defendants in *Becak*, 954 F.2d at 387; *Insley*, 927 F.2d at 186; and *Spinola*, 941 F.2d at 1529, all were residing with one or more parent; the defendant in *Woods* was in a halfway house with work release, 888 F.2d at 654; and the custodial conditions in some of the other cases are unclear but appeared to permit daytime release.

Similarly, the cases relied upon by the Bureau from other courts which have refused to grant credit because the conditions imposed were not substantial enough to be equivalent to imprisonment are inapposite to this case. *See, e.g., United States v. Zackular*, 945 F.2d 423, 425 (1st Cir. 1991) ("confinement to the comfort of one's own home is not the functional equivalent of incarceration in either a practical or a psychological sense"); *United States v. Edwards*, 960 F.2d 278, 282-85 (2d Cir. 1992) (confinement to uncle's apartment except for religious services, choir practice, court appearances and to meet with attorney with intermittent electronic monitoring is insufficient to constitue "official detention"); *Marrera v. Edwards*, 812 F.2d 1517, 1517 (6th Cir. 1987) (pretrial confinement for medical treatment not "custody"); *United States v. Robles*, 563 F.2d 1308, 1309 (9th Cir. 1977) (defendant released on recognizance with minimal restrictions not in "custody"), *cert. denied*, 435 U.S. 925 (1978); *United States v. Peterson*, 507 F.2d 1191, 1192 (D.C. Cir. 1974) (defendant "at large on conditional release" not in "custody"); *cf. United States v. Parker*, 902 F.2d 221, 222 (3d Cir. 1990) ("a period of confinement as a condition of probation, *subject to a defendant's being released to go to work*, cannot possibly be equated with an equivalent period of imprisonment" (emphasis added)).

We therefore do not believe it will be administratively difficult to give credit for time served by defendants under jail-type detention. The overwhelming majority of defendants will not be affected since only a small percentage of federal defendants are released to a halfway house. We also note that the Bureau was able to incorporate the Ninth Circuit's de-

cision into its Program Statement,[6] and there is no allegation, much less evidence, that this overwhelmed the Bureau's administrative process.

---

[6] The Program Statement accommodates the Ninth Circuit's decision in *Brown* by providing as to defendants governed by section 3568 that:

> An exception to the rule, contained in paragraph 7.b.(5) above, pertains to any person sentenced in the Ninth Circuit, regardless of where that person is presently located or may transfer, who was ordered to spend time in a halfway house as a condition of bond, if that condition required that the person spend the night in the halfway house. (If the person worked nights and was ordered to spend off duty hours in the halfway house, then such off duty hours would be considered "nights" for crediting purposes.) For this particular group of defendants, credit must be given for each presentence day spent in the halfway house. (See *Brown* v. *Rison*, 895 F.2d 533 (9th Cir. 1990).
>
> Regardless of whether a person is presently confined, or is received in the future, records need not be reviewed until the person requests *Brown* credit. Exhaustion of administrative remedy is not required. Credit may be requested on a request to staff member form. Credit will only be given when the person can provide evidence, e.g., name or pretrial services officer, name and location of the halfway house, and dates of "custody" in the halfway house, to support the claim that such credit exists.
>
> Based on the information provided by the prisoner, staff are responsible for obtaining necessary documentation to substantiate the claim before *Brown* credit may be given. If information is received from some source other than the prisoner that *Brown* credit may apply, of if it is obvious that such credit may apply, then staff shall initiate an inquiry by interviewing the prisoner involved.

Bureau of Prisons, Program Statement 5880.30(7)(b)(6) (July 16, 1993).

Moreover, we note the inherent unfairness in declining to grant credit to a defendant who sought bail but was confined under jail-like conditions without giving the defendant notice that this would be the result. Some defendants, such as Koray, might choose not to request bail under these circumstances, particularly if the alternative is "official detention" in a minimum-security type institution with facilites superior to those in the halfway house in question. Further, we cannot ignore that the government derives the full benefits of incarceration, protecting the public and ensuring the defendant's presence at trial at a lower cost while freeing scarce jail space for truly dangerous offenders. *See* Garry A. Berger, *Pre-Sentence Halfway House Residents: Are They Entitled to Credit Toward Subsequent Prison Sentences?*, 27 Colum. J.L. & Soc. Probs. 191, 194 n.11 (1993).

After careful consideration of the decisions of all the other courts to have ruled on the issue and the position of the Bureau of Prisons, we conclude that "official detention" for purposes of credit under 18 U.S.C. § 3585 includes time spent under conditions of jail-type confinement. While we do not go as far as does the Ninth Circuit which appears to authorize credit for confinement under somewhat less restrictive conditions, we believe the standard we establish is consistent with the language of the statute, Congress's intent, and the Burau's initial rationale under the statute. We are confident that the district courts will have no difficulty in applying this test in the few situations we anticipate will arise. To assist the district courts, we explain this does not include confinement in drug rehabilitation facilities, where the defendant is receiving the benefit of the confinement, nor of course any halfway house where defendant

leaves to work during part of the day. Because there has been no finding that Koray was in fact held under such conditions, we will remand for the necessary fact finding.

III.

We will reverse the order of the district court and remand for further proceedings consistent with this opinion. The district court should conduct those proceedings with expedition, because the time that Koray must serve in prison will have expired if he is entitled to credit for the time he was confined in the Volunteers of America facility.[1] The mandate shall issue forthwith.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

[1] We leave it to the discretion of the district court whether, under the circumstances, Koray should be released pending such a hearing.

APPENDIX B

[Filed Apr. 30, 1993]

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 3:CV-92-1458
(Judge Kosik)

ZIYA K. KORAY, PETITIONER

v.

FRANK SIZER, ET AL., RESPONDENTS

ORDER

This is a petition for a writ of habeas corpus filed under 28 U.S.C. § 2241 by Ziya Koray, an inmate at the Allenwood Federal Prison Camp, Montgomery Pennsylvania ("Allenwood"). Koray seeks an order directing the Bureau of Prisons to recompute his federal sentence to include sentence credit for time spent confined in a halfway house as a condition of bail. For the following reasons, the petition will be denied.

The facts are essentially undisputed. On April 23, 1991, Koray was arrested for laundering monetary instruments in violation of 18 U.S.C. § 1956(a)(1). He was released on bail with conditions under the Bail Reform Act on June 25, 1991. *See* 18 U.S.C. § 3142(c). Conditions of Koray's bail included the

requirement that he remain at a halfway house 24 hours per day unless accompanied by a special agent or authorized to leave by court order. Koray was convicted and sentenced on October 22, 1991, but permitted to remain under conditional release until November 25, 1991. On that date, Koray reported to Allenwood for service of his federal sentence.

By way of this petition, Koray seeks sentence credit for the time he spent confined in the halfway house between June 26, 1991 and November 24, 1991, alleging that the restrictive conditions of bail amounted to "official detention" under 18 U.S.C. § 3585.[1] Koray also argues that it violates equal protection to deny him sentence credit but to grant such credit for prisoners serving their federal sentences at halfway houses.

Though the Court of Appeals of the Third Circuit has yet to confront either argument, the monumental weight of authority counsels against granting the petition. *See United States v. Zackular*, 945 F.2d 423 (1st Cir. 1991) (official detention requirement of section 3585 can not be fulfilled by home confinement); *United States v. Edwards*, 960 F.2d 278 (2d Cir.

---

[1] Section 3585 provides that

> A defendant shall be given credit towards the sentence of a term of imprisonment for any time spent in official detention prior to the date the sentence commences
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

18 U.S.C. § 3585(b).

1992) (defendant released on bail subject to house arrest and electronic monitoring not entitled to sentencing credit for time spent on bail; no equal protection violation); *Tinsley v. Attorney General*, 806 F.Supp. 31 (S.D.N.Y. 1992) (time spent released on bond pending trial or sentence not time spent in "official detention" under § 3585(b)); *Randall v. Whelan*, 938 F.2d 522 (4th Cir. 1991) (defendant on bail in drug rehabilitation center at all times except for court appearances and meetings with counsel not entitled to sentence credit); *United States v. Insley*, 927 F.2d 185 (4th Cir. 1991) (restrictive conditions of bail including curfew and electronic monitoring do not constitute official detention under § 3585); *Starchild v. Federal Bureau of Prisons*, 973 F.2d 610 (8th Cir. 1992) (petitioner on bond under house arrest, not allowed to leave house except to go to probation office or court, and responsible custodians required to be with petitioner 24 hours per day prior to sentencing —sentence credit denied); *Moreland v. United States*, 968 F.2d 655 (8th Cir. 1992) (only time spent in jail-type facility creditable as jail time and halfway house is not a jail-type facility; no violation of equal protection); *United States v. Wickman*, 955 F.2d 592 (8th Cir. 1992) (house arrest is not official detention within the meaning of § 3585); *United States v. Woods*, 888 F.2d 653, 655 (10th Cir. 1989) (time spent on bond in residential treatment center prior to commencement of sentence not creditable; no equal protection violation). We fall in line with the many courts that have held restrictive bail conditions do not amount to official detention under § 3585. *See United States v. Parker*, 902 F.2d 221, 222 (3d Cir. 1990) (confinement at community corrections center subject to work release as condition of probation

"cannot possibly be equated with an equivalent period of imprisonment"). We also accept the argument that there is no violation of equal protection under the circumstances because the two revelant classes (pre-sentence detainees and duly sentenced prisoners) are not similarly situated.

NOW, THEREFORE, THIS 30th DAY OF APRIL, 1993, IT IS HEREBY ORDERED THAT:

1. The petition for a writ of habeas corpus is denied.
2. The Clerk of Court is directed to close this file.
3. Any appeal from this decision will be deemed frivolous, not taken in good faith, and lacking probable cause.

/s/ Edwin M. Kosik
EDWIN M. KOSIK
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7357

ZIYA K. KORAY, APPELLANT

v.

FRANK SIZER;
UNITED STATES BUREAU OF PRISONS;
ATTORNEY GENERAL OF THE UNITED STATES

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, *Circuit Judges*

The petition for rehearing filed by *Appellees*, FRANK SIZER; UNITED STATES BUREAU OF PRISONS; ATTORNEY GENERAL OF THE UNITED STATES in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ D. K. Sloviter
Chief Judge

Dated: Jun. 17, 1994

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-166

FRANK SIZER, Warden, PETITIONER

v.

ZIYA KORAY

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 15th, 1994.

/s/ David H. Souter
Associate Justice of the Supreme
Court of the United States

Dated this 8th day of September, 1994.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-166

FRANK SIZER, Warden, PETITIONER

v.

ZIYA KORAY

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended further to and including November 1st, 1994.

/s/ David H. Souter
Associate Justice of the Supreme
Court of the United States

Dated this 11th day of October, 1994.

APPENDIX F

U.S. Department of Justice
Federal Prison System

Washington, D.C. 20534

OPI	: MISB
Number	: 5880.24
Date	: September 5, 1979
Subject	: Sentence Computation, Jail Time Credit Under 18 USC 3568

Program Statement

1. *PURPOSE.* To establish the procedures to be followed for making jail-time credit determinations.

2. *DIRECTIVES AFFECTED.* PS 5880.19, *Credit for Time in Custody Under 18 USC 3568*, (5-27-75), is superseded.

3. *BACKGROUND.* Prior to October 2, 1960, credit for time in custody before sentencing was left to the discretion of the sentencing court. The presumption was that the sentencing judge would take the amount of time spent in custody prior to sentencing into consideration at the time sentence was imposed. This first crediting statute (P. L. 86-691, an amendment to 18 USC 3568) granted credit on minimum-mandatory sentences. These were primarily the sentences imposed under the Harrison Narcotic Act of 1956.

Judicial decisions later extended jail credit for those sentenced to the maximum sentence for violation of any statute, on the presumption that the sentencing

court did not take the amount of jail time into consideration at the time of sentencing. As policy, this applied only to those sentenced after the effective date (October 2, 1960) of P. L. 86-691.

The passage of the Bail Reform Act of 1966 (P. L. 89-465) further expanded the credit to be given under 18 USC 3568 to all persons sentenced on and after the effective date of the Act (September 20, 1966). The language of the Act required credit for all time in custody in connection with the federal offense. Case law confirmed the application of the Act to YCA, FJDA, and NARA sentences. Courts also expanded federal jail credit to include periods of custody wherein the primary custody was with a non-federal agency. Credit was held to be applicable on any subsequent federal term of confinement because of the effect the federal charges (through a warrant or detainer) had on the non-federal custody.

4. *STATUTORY AUTHORITY.* Jail time credit is controlled by 18 USC 3568, which states "The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or act for which sentence was imposed."

5. *POLICY.* "In custody" is defined, for purposes of this program statement, as *physical* incarceration in a jail-type institution or facility. It does not include all time that may be considered custody for habeas corpus jurisdiction purposes, for example in the case of *Hensley v. Municipal Court*, 411 U. S. 345 (1973) (See *Cochran* v. *U. S.*, 489 F.2d 691 (C.A. 5, 1974)).

Any part of a day spent in custody equals one day for credit purposes. Credit will be applied in the following manner for the following situations:

a. Sentences imposed prior to September 20, 1966.

Jail time credit will be applied 1.) to those sentences in which the maximum penalty was imposed, 2.) if the penalty of imprisonment added to the number of days in presentencing custody exceeds the maximum for the offense, or 3.) if the violation required the imposition of a minimum-mandatory penalty, and if the criteria in paragraph 5.b. are met.

(1) To determine if the maximum sentence was imposed, refer to the penalty provisions of the sections violated in the appropriate Title of the U. S. Code. If the sentence imposed represents the aggregation of terms on more than one count, jail time credit will be applied to the applicable count, prior to aggregating the terms.

(2) If a sentence is less than the maximum, but adding the sentence to the number of jail days exceeds the maximum for the offense, then jail time credit will be applicable for the number of days that caused the maximum for the offense to be exceeded.

(3) On a sentence imposed for an offense requiring the imposition of a minimum-mandatory penalty, the sentence imposed does not have to be the minimum-mandatory term. Any sentence imposed under the section requiring the minimum-mandatory penalty will be entitled to jail credit.

b. Sentences imposed on and after September 20, 1966.

(1) Jail time credit will be given for time spent in the custody of the Attorney General (whether actual or constructive) as a direct result of the acts or offenses which resulted in the federal sentence. (See Paragraph 5.c. for the criteria for constructive federal custody.)

(2) Jail time credit will not be given for any portion of time spent serving another sentence, either federal or non-federal, except that time spent serving a sentence that is vacated will be creditable toward another sentence if the later sentence is based on the same charges that led to the prior, vacated sentence. When failure to make bail due to indigency is a moot point, e.g., when another sentence is operative for the period of time in question, and any bail would not result in a change in custody status, then applying jail time would be giving double credit, i.e., credit on two separate and distinct sentences for the same period of time contrary to the intent of 18 USC 3568 to apply credit to sentences.

(3) Time spent under a writ of habeas corpus from non-federal custody will not, in itself, be considered for the purpose of crediting jail time. The primary reason for custody in this case is not the federal charge. In this situation, it is considered that the federal court "borrowed" the prisoner under the provisions of the writ for purposes of

court appearance. This is secondary custody. Credit may infrequently be given under provisions of another paragraph.

(4) Time spent in residence in a *residential community center* (or a community based program located in a Metropolitan Correctional Center or jail) under P.L. 91-492 as a condition of parole (18 USC 4209) or probation (18 USC 3651) is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568. However, time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of probation is creditable as jail time because of the greater degree of restraint.

(5) Time spent in residence in a *residential community center* (or a community based program located in a Metropolitan Correctional Center or jail) under the provisions of 18 USC 3146 as a condition of bail or bond, including the "Pretrial Services" program (18 USC 3152-3154), is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568. Also, a "highly restrictive" condition of bail or bond, such as requiring the defendant to report daily to the U. S. Marshal, is not considered as time

in custody. However, time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of bail or bond is creditable as jail time because of the greater degree of restraint.

c. Constructive Federal Custody.

(1) For time in non-federal custody when the non-federal custody is bases [*sic*] on charges that later resulted in a federal sentence:

(a) Credit will be given for all time spent in non-federal or foreign custody when the underlying basis for custody in fact is a federal warrant. For example, if a federal warrant is issued and the prisoner is arrested by county police or foreign officials on the basis of the federal warrant, credit will be given from the date of arrest to the date of sentence for all days in custody. Inquiries or requests for foreign jail time credit, along with copies of the judgment and commitment and BP-5, and copies of any documentation in the institution or in the possession of the inmate, must be sent to the central office Chief of Administrative Systems for verification and monitoring purposes.

(b) If the federal inmate has been in presentence state custody on essentially the same charges, credit will also be given even though a federal detainer

may not have been on file during that time. Credit will be given for time spent in non-federal pre-sentence custody when the non-federal and federal charges are similar enough to be considered the same criminal act or offense. This is applicable when the factors of time, location, and the criminal acts are identical in both charges. Credit will also be given for all time spent serving a state sentence (on the same charges as defined in this paragraph) which is later vacated, set aside, or dismissed, in addition to any other non-federal presentence time. Following are some situation examples:

1 If a prisoner is arrested by county police on a state charge of armed robbery, and the prisoner is later convicted by the federal government of bank robbery, which bank robbery occurred during the same, identical act of armed robbery, credit will be given for all time spent in custody from the date of arrest to the date of the imposition of the first sentence (whether federal or non-federal).

2 If a prisoner is arrested by state police on a state charge of auto theft, and the prisoner is later convicted of a Dyer Act violation, involving theft of the same automobile in both state and federal charges, credit will be

given for all time spent in custody from the date of arrest to the date of imposition of the first sentence (whether federal or non-federal). Credit is applicable because the state auto theft was the same criminal act, at the same time and place as the Dyer Act violation.

3 If a prisoner is arrested by city police on a state charge of uttering a forged check and the prisoner is later convicted by the federal government for mail theft, the prisoner having obtained the check in question from the mails, credit will not be given. It is not the identical criminal act. Uttering requires a separate criminal act from theft of the check.

4 If a prisoner is arrested by county police on a state charge of armed robbery and the prisoner is later convicted by the federal government for possession of an unregistered firearm, which is the same firearm used in the robbery, credit will be given.

5 If a prisoner is arrested by county police on a state charge of uttering forged checks and the prisoner is later convicted of conspiracy to defraud the U.S. Government, the checks in question being U.S. Treas-

ury checks used in the forgery, credit will *not* be given.

(2) For time in non-federal custody when the non-federal custody is based on charges that are unrelated to the federal charges that resulted in a federal sentence:

(a) Credit will be given on any subsequent federal term of imprisonment (to include parole and mandatory release violator terms) when the state withdraws, increases, or refuses to set bail, solely due to the fact that a federal detainer is lodged, and the state fails to give jail time credit for that time. [C]redit will be given from the time the federal detainer is lodged up to the time the sentence is executed (either federal or non-federal). The state authorities must verify the fact that their bail status is due to the lodging of the federal detainer. Failure to give jail credit (by the state) may be assumed in any of the following events: (1) the state charges are dismissed, (2) the state sentence is vacated with further prosecution deferred, thereby effectively vacating the state's award of jail credit, (3) state probation is granted, or (4) the state orders their sentence to run concurrently with the federal sentence, and the state sentence will be absorbed prior to grant of good time, resulting in no benefit from the state jail time. Ordinarily, if a sentence results from state

charges, there will be a presumption that the prisoner did receive credit for presentence time, however, this may be rebutted if the prisoner can demonstrate that the state did not credit the time.

(b) Credit will be given when a federal detainer is lodged, the prisoner does not make state bail based on a presumption of indigency, and the state fails to give jail credit for time. Credit will be given from the date the federal detainer was lodged up to the beginning date of either the federal or non-federal sentence, whichever occurs first. State bail must have been set. If the state charge was not bailable, no credit will apply to the federal sentence. Failure to give jail credit (by the state) may be assumed in any of the following events: (1) the state charges are dismissed, (2) the state sentence is vacated with further prosecution deferred, thereby effectively vacating the state's award of jail credit, (3) state probation is granted, or (4) the state orders their sentence to run concurrently with the federal sentence, and the state sentence will be absorbed prior to grant of good time, resulting in no benefit from the state jail time. Ordinarily, if a sentence results from the state charges, there will be a presumption that the prisoner did receive credit for presentence time, however,

this may be rebutted if the prisoner can demonstrate that the state did not credit the time.

(3) For time spent in custody of the Surgeon General as a civil commitment under Title I of NARA, credit will be given for all time in actual institutional confinement, if the later criminal sentence is a result of the same offense that led to the civil commitment. This is a specific provision of NARA, as codified under Title 28, U.S. Code, Section 2903(d).

6. *DOCUMENTATION.* Credit will be given only with proper documentation, indicating the prisoner was in custody within the application of paragraph 5. Proper documentation will consist of written documentation for the file from any law enforcement agency (including probation officers). This includes verified phone and teletype messages.

When there is cause to believe that credit may be due, arising from a request from the inmate or from other persons speaking in his behalf, or from any inconsistencies in the manner in which the factual situation presents itself, an effort to obtain the documentation necessary to make a determination will be made. Ordinarily this will consist of one communication (with written documentation that contact was made, either in the form of a carbon of the letter or teletype message, or by documenting the phone call) and one following communication if no response is received.

If the follow-up communication still produces no response, the matter should be referred to the Regional

Office. No further action should be taken locally in that particular case until instrction is received from the Regional Office.

Sample letters of suggested types of communications to other agencies are in the attachments to his Program Statement.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director

APPENDIX G

[Excerpt from Program Statement 5880.28, Sentence Computation Under 18 USC 3585 (July 29, 1994)]

* * * * *

c. Prior Custody Time Credit. The SRA includes a new statutory provision, 18 U.S.C. § 3585(b), that pertains to "credit for prior custody" *and is controlling for making time credit determinations for sentences imposed under the SRA.* Title 18 U.S.C. § 3568, as implemented by Program Statement 5880.24, *Sentence Computation, Jail Time Credit Under 18 U.S.C. § 3568,* was repealed effective November 1, 1987, but remains the controlling statute for all sentences imposed for offenses that occurred on or after September 20, 1966 up to November 1, 1987.

Statutory Authority: Prior custody time credit is controlled by 18 U.S.C. § 3585(b), and states,

> "A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence."

Definitions:

* * * * *

Official detention. "Official detention" is defined, for purposes of this policy, as time spent under a

federal detention order. This also includes time spent under a *detention* order when the court has *recommended* placement in a less secure environment or in a community based program as a condition of presentence detention. A person under these circumstances remains in "official detention", subject to the discretion of the Attorney General and the U.S. Marshals Service with respect to the place of detention. Those defendants placed in a program and/or residence as a condition of detention are subject to removal and return to a more secure environment at the discretion of the Attorney General and the U.S. Marshals Service, and further, remain subject to prosecution for escape from detention for any unauthorized absence from the program/residence. Such a person is not similarly situated with persons conditionally *released* from detention with a requirement of program participation and/or residence.

A defendant is not eligible for any credits while *released* from detention. Time spent in residence in a community corrections center as a result of the *Pretrial Services Act of 1982* (18 U.S.C. § 3152-3154), or as a result of a condition of bail or bond (18 U.S.C. § 3141-3143), is not creditable as presentence time. A condition of bail or bond which is "highly restrictive," and that includes "house arrest", "electronic monitoring" or "home confinement"; or such as requiring the defendant to report daily to the U.S. Marshal, U.S. Probation Service, or other person; is not considered as time in official detention. Such a defendant is not subject to the discretion of the U.S. Attorney General, the Bureau of Prisons, or the U.S. Marshals Service, regarding participation, placement, or subsequent return to a more secure environment,

and therefore is not in a status which would indicate an award of credit is appropriate (see *Randall* v. *Whelan*, 938 F2d 522 (4th Cir. 1991) and *U.S. v Insley*, 927 F.2d 185 (4th Cir. 1991). Further, the government may not prosecute for escape in the case of an unauthorized absence in such cases, as the person has been lawfully *released* from "official detention". (*Exception*: As a result of case law in the Ninth Circuit, credit for time spent in a community treatment center as a condition of bond (including appeal bond) is considered the same as time spent in "official detention" for those sentenced in the Ninth Circuit, if they were required to spend nights in the community corrections center. The credit follows the inmate if transferred into some other circuit but an inmate sentenced in a circuit other than the Ninth Circuit shall not be given the credit if transferred into the Ninth Circuit. This same type of credit also applies to a defendant whose probation or supervised release is revoked in the Ninth Circuit, providing that the time spent in the community treatment center occurred after the conduct that caused the probation or supervised release to be revoked. It is unlikely that this type of credit will ever apply to a supervised release or probation revocation sentence since the conduct that causes the revocation usually follows the time spent in a community corrections center.)

Official detention does not include time spent in the custody of the U.S. Immigration and Naturalization Service (INS) under the provisions of 18 U.S.C. § 1252 pending a final determination of deportability. An inmate being held by INS pending a civil deportation determination is not being held in "official detention" pending criminal charges. (See *Ramirez-Osorio* v. *INS*, 745 F.2d 937, rehearing denied 751

F.2d 383 (5th Cir. 1984); *Shoaee* v. *INS*, 704 F.2d 1079 (9th Cir. 1983); and *Cabral-Avila* v. *INS*, 589 F.2d 957 (9th Cir. 1978), cert. denied 440 U.S. 920, 99 S.Ct. 1245, 59 L.Ed2d 472 (1979.)

A sentence imposed by a court for "Time Served," means that all time spent in official detention (prior custody time), as a result of the offense for which sentence was imposed, is included in the "Time Served" sentence which the court imposed and cannot be awarded to any other sentence.

Time spent serving a civil contempt sentence prior to trial and/or sentencing does not constitute presentence time credit toward the sentence that is eventually imposed.

Time spent serving a civil contempt sentence does not constitute presentence time credit toward any criminal sentence that has been interrupted by, or that is running along concurrently with, or that is to be served consecutively to, the criminal sentence.

Official detention does not include any time in a release status even though the defendant is considered "in custody" for purposes of pursuing a habeas corpus petition with the court, as cited by the U.S. Supreme Court in *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973) (see also *Cochron* v. *U.S.*, 489 F.2d 691 (5th Cir. 1974); *Villaume* v. *United States*, 804 F.2d 498 (8th Cir. 1986) (per curiam), *cert. denied*, 481 U.S. 1022 (1987)).

* * * * *

(2) *DOCUMENTATION.* Prior custody credit will be given only with proper documentation indicating that the prisoner was in official detention within the application of paragraph 5. Proper documentation will consist of written documentation, for

placement in the prisoner's *Judgment and Commitment File*, from any law enforcement agency (including probation officers). This includes verified phone, fax, or teletype messages, PSI, Rap Sheet, Booking Sheets, Trial Transcripts, Sentry, USM Form 129, etc.

(a) When there is cause to believe that credit may be due, arising from an inmate request or from any other person speaking in his or her behalf, or from any other inconsistencies in the facts developed, an effort to obtain the documentation necessary to make a determination will be made. Ordinarily, this will consist of one communication (with written documentation that contact was made, either in the form of a copy of the letter, fax, or teletype message, or by documenting the phone call) and one following communication if no response is received.

(b) Should the Judgment and Commitment order make any reference to, or recommendations concerning prior custody credits, the term in effect may not be changed in an attempt to meet the language on the Judgment and Commitment. Contact with the court must be made, and the term in effect may only be changed when it is specifically approved by the court. See the ISM Manual regarding the preparation of any correspondence directed to the courts.

(c) No credit shall be given based solely on documents or information received from a prisoner, a defense attorney, or other person or organization acting on the behalf of the inmate. Information from such sources shall be thoroughly investigated and verified before credit may be given.

(d) If the follow-up communication produces no response, the matter should be referred to the appropriate Regional Inmate Systems Administrator.

(3) *QUESTIONABLE SITUATIONS.* Questions or problems that arise as to the applicability of any of the provisions of this policy shall be referred to the Regional Inmate Systems Administrator. Any resolution of a question or problem that may require a decision outside of, or contrary to, this policy or that may require a precedent setting decision, shall be referred to the Chief of Inmate Systems in the Central Office for review.

APPENDIX H

[Filed May 3, 1994]

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

92-CV-1458

ZIYA K. KORAY

v.

SIZER, ET AL.

ORDER

IT IS HEREBY ORDERED THAT ZIYA K. KORAY, Register Number 37880-053, be released from the Federal Prison Camp at Allenwood on May 4, 1994, at 6:00 a.m. Pending further order by this Court, Ziya K. Koray shall comply with the following conditions:

—He shall report as directed to the United States Probation Office in this district or as otherwise directed;

—He shall notify the Court, the Clerk of Court, his attorney and the United States Attorney of any change in residence address; and

—He shall not leave the United States without the approval of the Court.

Date: May 3, 1994

/s/ Edwin M. Kosik
EDWIN M. KOSIK
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 387147 20001